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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ARVIND SHANKAR,

Cross-complainant and
Appellant,

v.

JEFFREY CHU,

Cross-defendant and
Appellant.

B268290

(Los Angeles County
Super. Ct. No. BC377123)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Reversed in part with directions; cross-appeal dismissed.

Robert C. Moest; and Arvind Shankar, in pro. per., for Cross-complainant and Appellant Arvind Shankar.

Moon & Yang and Kane Moon for Cross-defendant and Appellant Jeffrey Chu.

Jeffrey Chu, M.D, former president of Chu Sarang Medical, Inc. (CSM), sued Arvind Shankar, M.D., a physician formerly employed by CSM, alleging breach of contract, breach of fiduciary duty, and other causes of action. Shankar then filed breach of contract, breach of fiduciary duty, fraud, wrongful termination, and unfair competition cross-claims against Chu and CSM. Shankar settled with CSM in 2012, resulting in a final judgment for \$1.5 million against the insolvent company. In 2013, the court issued a minute order granting Shankar's motion to add Chu as an additional judgment debtor under the 2012 CSM judgment, based on a provision in Shankar's employment agreement that required Chu to perform the company's duties under the agreement in the event the company became insolvent.

In 2015, the trial court, on Chu's motion, dismissed his complaint. Following a bench trial on Shankar's cross-complaint, the court issued a judgment resolving all Shankar's cross-claims in CSM and Chu's favors and absolving both cross-defendants of liability. Shankar appeals from this judgment, arguing that the trial court had no jurisdiction to issue a judgment inconsistent with its 2013 order. We disagree. The court never entered a final judgment enforcing the 2013 order—indeed, the court denied Shankar's requests for such a judgment prior to trial. The court was thus free to “change its mind” over the course of the two years of additional litigation that followed the 2013 order, and to issue a final judgment inconsistent with it.

Shankar further contends that the court erred in concluding Shankar failed to prove a breach of contract, because the employment agreement obligated Chu to pay the 2012 CSM judgment on the insolvent company's behalf, and the court's final judgment did not expressly consider whether Chu's failure to do so constituted a breach. But when, in its final judgment, the court

declined to add Chu as a judgment debtor, it necessarily—and correctly—rejected Shankar’s proposed interpretation of the employment agreement. Such an implicit rejection does not, as Shankar contends, violate due process, as the parties presented argument on the issue on at least three occasions, and the court expressly stated that it considered Shankar’s objections on this basis before issuing the final judgment.

Finally, Shankar challenges various rulings of the trial court, none of which reflects reversible error. Even if the trial court erred in the many ways Shankar contends, Shankar has failed to show—and the record does not support—that these purported errors were prejudicial, primarily because none of them affects Shankar’s failure to prove that he suffered any damages.

We agree with Shankar, however, that the 2012 CSM judgment disposed of all Shankar’s cross-claims *against CSM* and thus deprived the trial court of jurisdiction to adjudicate those claims in CSM’s favor in 2015. We therefore reverse the 2015 judgment to the extent it purports to adjudicate Shankar’s claims against CSM. In all other respects, we affirm.

In addition, we dismiss Chu’s cross-appeal, through which Chu purports to seek review of the 2013 interim order and clarification regarding the effect of that order on the August 2015 judgment. Chu’s cross-appeal fails to identify an appealable judgment or order, and in any event, is moot in light of our decision on Shankar’s appeal.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Chu Sarang Medical, Inc.*

All claims in this now over 12-year-old litigation involve CSM, a now defunct medical practice in Los Angeles. CSM began as a business venture between Chu and Seon Wook (aka Simon) Hong. Hong filed the articles of incorporation for the company and appears to have been its sole shareholder. Chu served as CSM's president. In March 2005, Chu hired Shankar to provide medical services for CSM on the terms set forth in a March 2005 employment agreement, which Chu signed on behalf of CSM.

Paragraph 14 of the agreement provided that “[i]n the event that [CSM] is dissolved, no longer active as a corporation in the State of California, or unable to perform its obligations, . . . Chu shall assume the obligations of [CSM] under this Agreement.”

B. *Shankar’s Successful Labor Commission Claim Against CSM and Chu*

Around April 2006, CSM ceased business operations. It subsequently became insolvent and was dissolved. CSM failed to pay Shankar any compensation for a period from approximately March to April 2006, and Shankar filed a claim with the Labor Commission to recover these unpaid wages from CSM. Shankar prevailed and converted the award into a final judgment against CSM. Because the company was insolvent, based on paragraph 14 of the employment agreement, Chu was added to that judgment as an additional judgment debtor. Chu has since personally paid Shankar all money owed under this judgment.

C. *Chu's Complaint and Shankar's Cross-Complaint*

The legality of CSM's operations, whether CSM was a properly structured professional medical corporation, and the roles of Chu, Hong, and Shankar in the company's downfall, were central questions of fact in the litigation below. The parties continue to dispute various facts in this regard. We need not, however, resolve these disputes in order to decide the issues on appeal.

In connection with these disputes, in September 2007, Chu filed a complaint against Shankar, Hong and others,¹ both in his own name and on CSM's behalf. Soon thereafter, Shankar filed a cross-complaint against CSM and Chu, alleging breach of contract, wrongful termination, and breach of fiduciary duty causes of action. As with Chu's complaint, allegations that CSM's business practices were illegal and/or fraudulent formed the undercurrent of Shankar's claims, although Shankar cast blame for such activity in Chu and Hong's direction. Specifically, Shankar alleged that Chu and Hong breached various obligations under the employment agreement as part of the activities that ultimately led to CSM's collapse, which Shankar alleges damaged him in various ways. Shankar's third amended cross-complaint is the operative version of this pleading, and alleges these same causes of action, as well as fraud and unfair business practices in violation of Business and Professions Code section 17200.

¹ The additional defendants in Chu's lawsuit are not parties to the appeal or cross-appeal before us.

D. *Chu-Hong Settlement Agreement*

On September 19, 2012, Chu and Hong executed a settlement of their claims. Attorney Robert Moest represented Hong at the time. Under the terms of the settlement, neither party received any monetary payment, and Chu agreed Hong would have sole authority to prosecute litigation on CSM's behalf.

On the same day Chu and Hong executed this settlement, Hong executed a declaration authorizing Moest to represent CSM in the continuing litigation against Shankar and others.

E. *CSM-Shankar Settlement and Resulting 2012 Judgment*

On September 24, 2012, Moest executed an offer of compromise to Shankar on behalf of CSM. (See Code Civ. Proc., § 998, subd. (b).)² The proposed compromise disposed of all claims and cross-claims between Shankar and CSM. Although CSM had not had any assets for over four years, Moest's offer included a \$1.5 million payment from CSM to Shankar. Moest, on CSM's behalf, sought dismissal of all CSM's claims against Shankar, and soon thereafter, Shankar accepted the offer of compromise. Based solely on this accepted section 998 offer of compromise, the court entered a judgment on October 11, 2012 (2012 CSM judgment) that adjudicated all claims between CSM and Shankar in Shankar's favor. (§ 998, subd. (a)(1).) Because the 2012 CSM judgment incorporated all terms of the section 998 compromise, it required CSM to pay Shankar \$1.5 million.

After the 2012 CSM judgment, CSM was no longer a party to any pending claims in the litigation.

² Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

F. *March 2013 Order Granting Motion to Add Chu as a Judgment Debtor Under the 2012 CSM Judgment*

Less than two months after negotiating the 2012 CSM judgment on behalf of CSM, Moest began representing Shankar. Through his new attorney Moest, Shankar moved to add Chu as an additional judgment debtor under the 2012 CSM judgment, thereby seeking to recover from Chu the \$1.5 million that the insolvent company—acting through its former attorney Moest—had agreed to pay Shankar. Moest and Shankar argued Chu should pay CSM’s liability to Shankar under the 2012 CSM judgment, based on paragraph 14 of the employment agreement, in which Chu had agreed to “assume the obligations of [CSM] under [the employment] [a]greement,” in the event CSM became insolvent.

Chu opposed the motion based in part on Moest’s previous representation of CSM. Shankar filed his reply to that opposition in propria persona, attaching to the reply a declaration, in which Moest explained that “due to the urgency of [the motion] and various conflicts that arose as a result of calendaring, Dr. Shankar has substituted me out as his attorney.” No substitution of attorney effecting this change was ever filed, but Shankar represented himself throughout the remainder of the trial court proceedings.

On March 27, 2013, Judge Michael Stern heard argument on Shankar’s motion to add Chu as a judgment debtor. This was the first substantive issue Judge Stern considered in this matter, having been assigned to the case on February 1, 2013, after the previous trial judge, Judge Robert Hess, recused himself. Judge Stern granted the motion based solely on his then view that paragraph 14 of the employment agreement required Chu to assume CSM’s liabilities under the 2012 CSM judgment.

The court's March 27, 2013 minute order to this effect further instructed Shankar to prepare and submit to opposing counsel a proposed amended judgment in light of the court's ruling. Chu filed objections to the court's order. The record does not reflect that Shankar ever filed such a proposed amended judgment.

G. *Shankar's Unsuccessful Efforts to Enforce the March 2013 Order*

On April 17, 2013, Shankar filed an ex parte application to amend the judgment in conformity with the court's March 2013 order. Shankar did not attach a proposed amended judgment to the application. The court issued a minute order denying the motion without comment.

Soon thereafter, Shankar sought effectively the same relief again, this time via a motion "for an order directing the post-judgment unit to enforce the amended judgment" (though the court had not issued any amended judgment). (Capitalization omitted.) Meanwhile, Chu moved the court to set aside the March 2013 order entirely, on the basis that the settlement agreement between CSM and Shankar was an invalid compromise. The court denied both motions in a minute order without comment.

Shankar appealed the court's denial of his motion to "amend the judgment." We dismissed the appeal. As we explained in an unpublished October 29, 2014 decision, the order denying Shankar's motion to enforce the "amended judgment" was not "an appealable postjudgment order," and "contain[ed] no judgment as to Chu." (See *Chu v. Shankar* (Oct. 29, 2014, B251363) [nonpub. opn.].) Moreover, we explained, even if the court had entered an amended judgment pursuant to its March 27, 2013 minute order—which it had not—that judgment "would not be a final judgment as to either Chu or Shankar, because it resolved none of the pending claims and cross-claims between Chu and Shankar." (*Ibid.*)

H. *Pre-Trial Rulings Related to Shankar's Breach of Fiduciary Duty Cross-Claim*

In June 2013, Chu successfully moved for judgment on the pleadings regarding Shankar's breach of fiduciary duty cross-claim, based on a lack of fiduciary duty on the facts alleged.

In August 2013, Shankar moved for leave to file a proposed fourth amended cross-complaint, which added allegations regarding various topics, purportedly in light of a 2009 decision of the Court of Appeal that further clarified the requirements for a breach of fiduciary duty claim. The court denied the motion on the basis that Shankar had identified no new facts or new law warranting further amendment.

I. *Bench Trial on Shankar's Breach of Contract, Wrongful Termination, Fraud, and UCL Cross-Claims*

As trial neared, Shankar failed to timely post jury fees, and the trial court denied his request for relief from the resulting statutory waiver of a jury trial. Shortly before trial, Chu sought to voluntarily dismiss his complaint in full, and the court ultimately dismissed all Chu's claims against Shankar without prejudice. Thus, a bench trial proceeded solely on the remaining claims in the third amended cross-complaint: Shankar's breach of contract, wrongful discharge, fraud, and unfair competition law causes of action against Chu.

Shankar represented himself at trial. CSM did not appear at trial.

1. *Shankar's examination of Chu*

The court heard testimony from Chu and Shankar. Shankar questioned Chu for approximately five and one-half hours. Throughout Shankar's questioning of Chu, the court repeatedly

admonished Shankar to refrain from argument and to focus on questions relevant to the causes of action being tried. Despite these admonitions, Shankar continued to elicit testimony that, as the court correctly noted, “[didn’t] assist the trier of fact in resolving the case,” and to present argument rather than ask questions of the witness. Shortly after the mid-afternoon break on the first day of trial, the court indicated it had heard “about a half an hour of useful testimony” since Shankar began questioning Chu that morning, and informed Shankar that he would have until the end of the day to complete his examination of Chu, because “[m]ost of the testimony [it had] heard [that day] . . . has not been pertinent or useful for the resolution of the issues contained in [Shankar’s] cross-complaint.” The court indicated this left Shankar with “over an hour” of questioning. In the remainder of his cross-examination of Chu, the court continued to admonish Shankar for eliciting irrelevant or cumulative testimony and for presenting argument rather than asking questions.

Chu’s counsel declined direct examination of Chu the next day, and the court denied Shankar’s requests to reopen his examination of Chu for impeachment purposes.

2. *Evidentiary rulings*

At trial, the court excluded several documents Shankar contended would contradict or undermine Chu’s testimony on various topics. These included declarations signed by Chu and filed in support of various briefs and pleadings earlier in the litigation, declarations signed by Hong and filed earlier in the litigation, and the Chu-Hong settlement agreement. The court also declined to take judicial notice of the substance of Chu’s initial complaint in the matter.

J. *Damages Shankar Sought at Trial*

At trial, Shankar indicated that, his initial prayer for relief notwithstanding, he sought damages solely in the form of: (1) the \$1.5 million payment due under the 2012 CSM judgment, and (2) loss of salary in the years since leaving CSM, resulting from his claimed inability to find employment as a doctor as a “consequence” of the alleged fraud and wrongful termination.

K. *2015 Judgment in Favor of Chu and CSM*

At the conclusion of trial, the court indicated it would find in favor of Chu and CSM on all Shankar’s cross-claims. In an August 2015 written statement explaining this decision, as to Shankar’s breach of contract and fraud causes of action, the court found that Shankar had failed to offer any proof of damages not already collected via the Labor Commission action. The court further concluded Shankar had failed to prove other elements of his claims. Namely, it found Shankar had offered nothing to prove he was constructively discharged when CSM denied him access to certain records, and/or that his discharge was in violation of public policy. Nor had he proven Chu had failed to perform any obligation under the employment agreement.³ With respect to Shankar’s

³ The court explicitly rejected as a basis for a breach of contract claim several different employment agreement obligations that Shankar had identified in his third amended cross-complaint and offered evidence of at trial. It did not address whether the agreement obligated Chu to pay the 2012 CSM judgment or whether Chu had breached the agreement by failing to do so. Specifically, the court concluded Shankar had not proven: (1) that CSM failed to notify Shankar it was no longer a “lawfully formed and active professional medical corporation” as required by paragraph 3.2 of the agreement; (2) that CSM had failed to pay

fraud claims, the court concluded Shankar had failed to prove CSM was not an active professional medical corporation at the time of Shankar's employment, and thus that he had not proven Chu fraudulently represented that CSM had such status. Finally, the court concluded Shankar had failed to offer proof of any "unfair business practices" that might support his statutory Business and Professions Code section 17200 claim.

Shankar filed written objections to the statement of decision, arguing, inter alia, that Chu's failure to pay Shankar under the 2012 CSM judgment constituted a breach of paragraph 14 of the employment agreement, and that the March 2013 order had already confirmed Chu was liable under the 2012 CSM judgment. After considering these objections, the court adopted its original statement of decision as the final judgment on the cross-complaint, adding only that Chu and CSM "shall recover their costs of suit pursuant to a timely-filed memorandum of costs."

L. *Appeal, Cross-Appeal, and Motions Before This Court*

Shankar filed a timely notice of appeal from the court's August 2015 judgment. Chu filed a notice of cross-appeal, purporting to appeal from a March 3, 2013 order. Chu's counsel represented in its briefing to this court that this was intended to be a reference to the court's March 27, 2013 order.

for Shankar's medical malpractice insurance; (3) that CSM failed to provide "qualified personnel to assist in physical therapy patient care" (capitalization omitted); (4) that CSM terminated the employment agreement without 30 days notice; (5) that CSM failed to pay Shankar wages from March 15 to April 14, 2006 and associated statutory penalties; and (6) that CSM failed to "notify patient's [*sic*] or maintain medical charts." (Capitalization omitted.)

DISCUSSION

I. Shankar's Appeal

Shankar raises numerous issues on appeal. We address each in turn below.

A. *The Trial Court Erred in Adjudicating Shankar's Cross-Claims Against CSM*

Shankar argues that the August 2015 judgment reflects error in that it purports to adjudicate Shankar's cross-claims against CSM, all of which the court already dismissed pursuant to the 2012 CSM judgment. Shankar's argument presents a jurisdictional question, which we review de novo. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.)

The 2012 CSM judgment is a signed judgment that "leaves no issue to be determined as to one party [CSM]," and thus constitutes a final judgment as to CSM. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568; see *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304.) "[W]hen a final judgment is entered, all causes of action arising from the same obligation are merged into the judgment and all alternative remedies to enforce that obligation extinguished by the judgment granting one of those remedies.'" (*Diamond Heights Village Assn., Inc. v. Financial Freedom Senior Funding Corp.* (2011) 196 Cal.App.4th 290, 301-302, quoting *O'Neil v. General Security Corp.* (1992) 4 Cal.App.4th 587, 602.) After the 2012 CSM judgment, no obligations or causes of action by or against CSM remained to be adjudicated. The court therefore lacked jurisdiction to issue the August 2015 judgment, to the extent that judgment purports to adjudicate any claims against CSM.

B. *The Court Did Not Err in Its Implicit Finding That Chu Is Not Obligated to Pay the 2012 CSM Judgment*

At trial, Shankar presented two arguments, through which he sought to recover from Chu the \$1.5 million CSM owes Shankar under the 2012 CSM judgment. First, Shankar argued Chu was liable as an additional judgment debtor, citing the court's March 2013 order granting Shankar's motion to add Chu to the 2012 judgment in this capacity. Second, Shankar argued that, even if Chu was not added as a judgment debtor to the 2012 CSM judgment, employment agreement paragraph 14 obligated Chu to fulfill CSM's duties under the agreement if the company became insolvent. According to Shankar, those duties included paying the insolvent company's \$1.5 million liability under the 2012 CSM judgment, and Chu's failure to do so constituted an independently actionable breach of contract.

The trial court necessarily rejected both of these arguments when it issued its final August 2015 judgment absolving Chu of all liability. For the reasons we discuss below, Shankar's arguments challenging the trial court's judgment in this respect fail.

1. *The court was free to and did decline to add Chu as a judgment debtor under the 2012 CSM judgment*

Shankar first argues that because the court issued a minute order granting Shankar's motion to add Chu as a judgment debtor and never expressly reconsidered this decision, the court could not later issue a judgment inconsistent with that order. According to Shankar, doing so "spontaneously reversed a liability of \$1.5 million . . . without even giving any party a new opportunity to address the issue, and without stating [the court's] reasons for doing so[.]" thereby triggering due process concerns. Shankar

requests that we “direct the trial court to enter an [a]mended [j]udgment in which Dr. Chu is explicitly identified as an additional [j]udgment [d]ebtor” under the 2012 CSM judgment. This presents a purely legal question regarding the scope of the court’s authority to issue a judgment inconsistent with its past orders, and our review is de novo. (See *Muro v. Cornerstone Staffing Solutions, Inc.* (2018) 20 Cal.App.5th 784, 790 (*Muro*).)

Shankar’s argument proceeds from the flawed premise that the trial court’s March 2013 order represented a final judgment, by which the court was forever bound. Not so. This court has already concluded that the March 2013 order was *not* a final judgment as to Chu or Shankar. (See *Chu v. Shankar, supra*, B251363.) The trial court never entered a final judgment based on that order. Indeed, the court denied two pretrial motions seeking such an amended judgment.

Part of the significance of a final judgment is that, “[u]ntil a final judgment is rendered[,] the trial court may . . . alter[] the rulings from which an appeal would otherwise have been taken.” (*Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 966–967 (*Kinoshita*).) This is because a “trial is not complete but is still in process of determination until findings are signed and filed. Until that time, the trier of the fact may change his mind.” (*Reimer v. Firpo* (1949) 94 Cal.App.2d 798, 800 (*Reimer*).) Indeed, the law encourages continuous and holistic evaluation of a case until a final judgment is entered. (See *Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156–1157 (*Darling*) [“judicial resources would be wasted if the court could not, on its own motion, review and change its interim rulings]; see also *Kinoshita, supra*, 186 Cal.App.3d at pp. 966–967.) “ “A court could not operate successfully under the requirement of infallibility in its interim rulings. Miscarriage of justice results where a court is unable

to correct its own perceived legal errors.” ’ ’ (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105, quoting *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172, 185.) It follows that, “even though an order has been made directing the entry of judgment, [a court] may order a different judgment to be entered.” (*Reimer, supra*, 94 Cal.App.2d at p. 800.)

Here, the trial court unambiguously exercised this ability to “change its decision” regarding the scope of Chu’s liability for CSM’s debts when the court issued a final judgment that absolved Chu of all liability. (*Darling, supra*, 75 Cal.App.4th at p. 1156.) Judge Stern had been presiding over the matter for less than two months at the time he heard and decided Shankar’s 2013 motion, a decision he based on his reading of employment agreement paragraph 14 as encompassing CSM’s debt under the 2012 CSM judgment. Consistent with this, at the March 27, 2013 hearing, the court rejected a characterization of the employment agreement as limited in scope to “simply . . . the wages and the compensation [for] employment.” Later, however, with the benefit of more than two years of involvement in the case—including a two-day bench trial—the court adopted the view of the employment agreement it had previously rejected. Specifically, in the August 2015 statement of decision, the court agreed that the purpose of the employment agreement was “to define Shankar’s employment,” and that, via the agreement, Chu assumed “the obligation to pay Shankar’s unpaid wages after his employment concluded.” This narrower view of the employment agreement is consistent with the court ultimately rejecting—as it implicitly did in its August 2015 final judgment—that paragraph 14 of the employment agreement imposes any liability on Chu based on the 2012 CSM judgment.

Shankar’s due process argument that the parties were denied the opportunity to argue this issue is without merit. The parties

offered briefing and argument in this regard on at least two occasions before the statement of decision, and Shankar was heard again on the issue via his written objections to the statement.

The court was thus free to decline to add Chu as a judgment debtor under the 2012 CSM judgment, the March 2013 order notwithstanding.

2. *The court considered and correctly rejected Shankar’s breach of contract theory based on the 2012 CSM judgment*

Shankar next argues that the court “misconstrued” Shankar’s breach of contract claim and ignored applicable law and facts, because the statement of decision does not expressly address Shankar’s theory that Chu breached the employment agreement by refusing to pay the 2012 CSM judgment. This theory is based on Shankar’s interpretation of employment agreement paragraph 14 as obligating Chu to pay *all* CSM debts in the event of the company’s insolvency—including the 2012 CSM judgment, regardless of whether or not the court added Chu as a debtor on that 2012 judgment.

But before adopting its statement of decision, the court acknowledged Shankar’s objections thereto, in which Shankar raised his theory that satisfying CSM’s \$1.5 million liability fell within the scope of Chu’s obligations under paragraph 14 of the employment agreement. Thus, the court’s silence on this topic in concluding Shankar had failed to prove a breach does not reflect that the court misunderstood or ignored Shankar’s theory of breach, but rather that the court *rejected* the theory.

Whether the court erred in rejecting this argument turns on the interpretation of the employment agreement, a question we review de novo. (See *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527.) The phrase employed in paragraph 14—“obligations under

this [employment] agreement”—constitutes “clear and explicit” language, the common sense meaning of which does not encompass obligations CSM would assume years later as part of a litigation settlement. (See Civ. Code, § 1638 “[t]he language of a contract is to govern its interpretation, if the language is clear and explicit”]; *id.*, § 1644 “[t]he words of a contract are to be understood in their ordinary and popular sense”].) We therefore agree with the trial court’s implicit finding that the 2012 CSM judgment was not an “obligation under [the employment] agreement.”⁴

C. *The Trial Court Did Not Abuse Its Discretion in Denying Shankar Relief from His Statutory Waiver of a Jury Trial*

Shankar argues the court abused its discretion in denying Shankar’s motion for relief from Shankar’s statutory waiver of a jury trial, based on his failure to timely pay jury fees. (See *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 364 (*McIntosh*) [denial of relief from jury waiver reviewed for abuse of discretion].) The proper remedy for such a purported abuse of discretion is a writ of mandate *prior to the trial*, not an appeal after the trial has concluded. (*Ibid.*; see *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654 (*Byram*).) “Reversal of the trial court’s refusal to allow a jury trial after a trial to the court . . . require[s] reversal of the judgment and a new trial” (*ibid.*; *Tyler v. Norton*

⁴ Because the record provides ample basis for rejecting Shankar’s arguments regarding Chu’s failure to satisfy the 2012 CSM judgment, we need not consider whether the dual role of attorney Moest in both negotiating the 2012 CSM settlement with Shankar on behalf of CSM—a settlement extremely favorable to Shankar—and, months later, representing Shankar in efforts to collect under that same settlement, might provide an alternative basis for denying the relief Shankar requests.

(1973) 34 Cal.App.3d 717, 722 (*Tyler*)), which is both “inefficient and time consuming.” (*Byram, supra*, 74 Cal.App.3d at p. 654.) Moreover, seeking such relief only after a bench trial has concluded allows defendants to “play ‘[h]eads I win, [t]ails you lose’ with the trial court.” (*Tyler, supra*, 34 Cal.App.3d at p. 722.) Thus, where a defendant fails to seek pretrial review of a court’s denial of a jury trial, the defendant must make “ ‘a showing of *actual prejudice* on the record to overcome the presumption that a fair trial was had[,] and prejudice will not be presumed from the fact that trial was to the court or to a jury.’ ” (*McIntosh, supra*, 151 Cal.App.3d at p. 363, quoting *Byram, supra*, 74 Cal.App.3d at p. 653.)

Shankar has not identified any prejudice resulting from his case being tried before a judge as opposed to a jury. Thus, at this procedural stage, “it is presumed that [Shankar] had the benefit of a fair and impartial trial as contemplated by the Constitution.” (*McIntosh, supra*, 151 Cal.App.3d at p. 363, citing *Glogau v. Hagan* (1951) 107 Cal.App.2d 313, 318–319.) The general policy favoring jury trials does not mandate a different result. (See *Byram, supra*, 74 Cal.App.3d at p. 653.)

D. *The Court Did Not Err in Granting Chu’s Motion for Judgment on Shankar’s Breach of Fiduciary Duty Cross-Claim*

Shankar contends the trial court erred when it partially granted Chu’s motion for judgment on the pleadings and prevented Shankar from trying his breach of fiduciary duty claim against Chu. Shankar argues that the third amended cross-complaint sufficiently alleges Chu owed Shankar a fiduciary duty. In reviewing a judgment on the pleadings, “ ‘[w]e review the complaint de novo to determine whether [it] alleges facts sufficient to state a cause of action under any legal theory.’ ” (*McCormick v. Travelers Ins. Co.* (2001) 86 Cal.App.4th 404, 408 (*McCormick*).)

Shankar cites the “trust fund doctrine,” set forth under California law in *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1039–1041 (*Berg*). *Berg* held that a corporate director owes a limited duty to an insolvent or nearly insolvent corporation’s creditors to avoid “conduct that divert[s], dissipate[s], or unduly risk[s] corporate assets that might otherwise [be] used to satisfy creditors’ claims.” (See *Berg, supra*, 178 Cal.App.4th at p. 1041.)

Shankar argues this doctrine applies, because the third amended cross-complaint alleges Chu held himself out as a CSM director and wasted corporate assets while CSM was insolvent or nearing insolvency. But even assuming this doctrine applies to an employee who only *holds himself out as* a director, it would not assist Shankar’s breach of fiduciary duty claims or warrant reversal of the trial court’s summary judgment.

This is because the trust fund doctrine protects existing creditors of an insolvent or nearly insolvent company and imposes a specific, limited duty to protect whatever assets the company has left, in the hopes that the company will be able to satisfy as many of its outstanding debts as possible. CSM’s debt to Shankar for unpaid wages and other compensation was paid in full via the Labor Commission action; Shankar is no longer a CSM creditor in this respect. And with respect to the \$1.5 million Shankar seeks to collect from the company, Shankar did not become a CSM creditor for that amount until 2012, four years after the company no longer had any assets to protect. Chu thus could not have breached any duty—even assuming he had one—under the trust fund doctrine to preserve remaining assets.

The trial court did not err in concluding Shankar had not pleaded a viable breach of fiduciary duty claim. (See *McCormick, supra*, 86 Cal.App.4th at p. 408.)

E. *The Majority of Shankar’s Remaining Arguments Do Not Identify Reversible Error, Because They Do Not Affect Shankar’s Failure to Prove Damages at Trial*

The trial court concluded Shankar had failed to prove any of the damages he sought at trial. Specifically, the court (1) implicitly found that Chu was not liable under the 2012 CSM judgment, meaning Shankar had not shown entitlement to the \$1.5 million in claimed damages under that judgment, and (2) found that Shankar had failed to prove loss of salary as a medical doctor in the years following his departure from CSM. Because damages are a necessary element of Shankar’s claims, in order for any purported error to have been prejudicial and warrant reversal, it must have affected Shankar’s ability to prove damages. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, citing Cal. Const., art. VI, § 13 [reversible error requires prejudice, which is not presumed].) Shankar identifies no such errors in any of his remaining arguments.

1. *Evidentiary rulings*

Shankar contends that the trial court erred by excluding certain documents, refusing to take judicial notice of the substance of Chu’s initial complaint, and imposing time limitations on Shankar’s examination of Chu. Shankar contends this evidence would have “directly contradicted [Chu’s] trial testimony.” But Chu did not testify regarding the damages Shankar suffered. Nor does Shankar explain how Chu’s testimony might have been relevant to damages. Because nothing in the record supports that Shankar was prevented from presenting evidence of damages, any error in the court’s evidentiary rulings was not prejudicial, and would not warrant reversal. (See *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 290–292 [prejudice required for reversal of

errors in excluding “irrelevant, prejudicial or cumulative” evidence or rulings to “expedite proceedings which, in the court’s view, are dragging on too long without significantly aiding the trier of fact”].)

Shankar counters that he need not establish prejudice, because the challenged rulings violated his due process right to present evidence and cross-examine witnesses, and thus constituted reversible error per se. Shankar’s argument ignores a trial court’s “inherent authority . . . to supervise proceedings for the orderly conduct of the court’s business and to guard against inept procedures and *unnecessary indulgences that tend to delay the conduct of its proceedings*. [Citation.] In this vein, *the court has the power to expedite proceedings [that], in the court’s view, are dragging on too long without significantly aiding the trier of fact.*” (*California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 22, italics added.) This is precisely what the trial court did here. Due process restricts a court’s exercise of such authority only where the trial court denied the litigant a meaningful opportunity to be heard; for example, by summarily and/or completely denying the litigant the right to present testimony, cross-examine a witness, or offer evidence. (See *In re Marriage of Carlsson, supra*, 163 Cal.App.4th at p. 291.) All cases Shankar cites to support his due process argument presented such circumstances. (See, e.g., *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 674; *In re Marriage of Carlsson, supra*, 163 Cal.App.4th at pp. 290–292.) Here, by contrast, Shankar was afforded a “full and fair opportunity . . . to present all competent, relevant, and material evidence bearing upon any issue properly presented for determination.” (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357–1358 (italics omitted), quoting *Shippey v. Shippey* (1943) 58 Cal.App.2d 174, 177.) Specifically, he was permitted to offer into evidence numerous

documents—including documents impeaching Chu’s testimony—and to question Chu for over five hours out of a two-day trial. The court did not summarily conclude the testimony when Shankar failed to heed repeated warnings, but rather permitted Shankar over an hour to complete his examination. This did not deny Shankar due process.

2. *Adjudication of the second amended cross-complaint*

Shankar argues that the judgment should be reversed because it professes to adjudicate the second amended cross-complaint, as opposed to the third amended cross-complaint. Shankar is correct that the third amended cross-complaint was the operative pleading, and thus sets forth the causes of action for adjudication at trial. (See *State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131.) Shankar has not identified any allegations unique to the third amended complaint that, if true, would support a finding of damages. Nor can this court identify any. Thus, the trial court’s possible adjudication of the second amended cross-complaint, rather than the third,⁵ cannot constitute reversible error.

⁵ Certain language in the statement of decision suggests that the court may have been mistakenly referring to the second amended cross-complaint, even though it was in substance analyzing the third amended cross-complaint. Given our disposition of the issue on the basis discussed above, however, we need not, and do not, consider whether such a conclusion is warranted.

3. *Denial of leave to amend cross-complaint*

Shankar argues the trial court erred by denying his requests before and after trial to file a fourth amended cross-complaint. We review denials of leave to amend for an abuse of discretion. (See *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 321-322.) Even if true, the new allegations in the proposed fourth amended cross-complaint do not “cure[]” Shankar’s failure to prove damages. There is thus no “reasonable possibility that the pleading can be cured by amendment[,]” and the court did not abuse its discretion in denying Shankar leave to amend.⁶ (*Ibid.*)

4. *Court’s analysis in the statement of decision*

Shankar challenges various aspects of the court’s analysis in the statement of decision. Specifically, he argues the court “refus[ed] to consider” certain evidence, “[sought] proof on matters that were entirely irrelevant,” and “disregard[ed] . . . the substantive law” applicable to certain of his claims. (Underlining omitted.) None of these criticisms suggests Shankar was prevented from presenting, or that the court ignored, evidence that might prove Shankar suffered damages. Thus, even if Shankar’s arguments have any merit—which we need not and do not consider—they do not identify any reversible error.

⁶ Nor are we persuaded that the 2009 decision Shankar identifies as the primary basis for his desired amendment constitutes “new law” supporting an amendment, given that it was issued almost four years before his request to amend.

F. *The Court Did Not Err in Dismissing Chu’s Complaint Without Prejudice*

Shifting focus to Chu’s original complaint against Shankar, Shankar next argues that the trial court erred by dismissing Chu’s claims without prejudice, because section 581, subdivisions (d) and (e) require such dismissal with prejudice. This presents a legal issue we review de novo. (See *Muro, supra*, 20 Cal.App.5th at p. 790.) Under section 581, subdivisions (d) and (e), where a party abandons or requests dismissal of its claims *after trial commences*, the court must dismiss those claims with prejudice. (See *ibid.*) Here, Chu filed a request for dismissal on July 29, 2015, several days before “the actual commencement of trial.” (*Id.*, subd. (e).) Thus, section 581, subdivisions (d) and (e) do not apply, and the trial court was free to dismiss with or without prejudice.

G. *The Court Correctly Awarded Costs to Chu*

The prevailing party in litigation is statutorily entitled to costs. (See § 1032, subd. (a)(4).) Shankar argues that the trial court erred in awarding costs to Chu and CSM because the 2012 CSM judgment and the March 2013 minute order prevent either Chu or CSM from constituting a “prevailing party” as defined by the Code of Civil Procedure. (See *ibid.*) We review Shankar’s argument for abuse of discretion (*Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 Cal.App.4th 847, 852), and agree with respect to CSM, but not Chu.

Shankar and CSM resolved all claims between them via a compromise involving a net payment to Shankar, not CSM, reflected in the 2012 CSM judgment. Thus, the trial court erred in determining that CSM was a prevailing party entitled to costs. (See § 1032, subd. (a)(4).) However, as discussed above, Chu was not a party to, nor otherwise bound by, the 2012 CSM judgment,

and the court ultimately found Chu was not liable to Shankar under any of Shankar's cross-claims. Thus, as a "defendant in whose favor a dismissal [was] entered," Chu qualifies as a prevailing party, and the court did not abuse its discretion by awarding him costs. (*Ibid.*)

II. Shankar's Motion to Dismiss Chu's Cross-Appeal

We next turn to Chu's cross-appeal. Chu filed a notice of cross-appeal from "an [o]rder dated March 3, 2013." As Shankar correctly points out in his motion to dismiss Chu's cross-appeal, no such order exists. Chu's notice thus fails to identify an appealable order.

In substance, Chu's briefing appears directed at: (1) the March 27, 2013 order granting Shankar's motion to add Chu as a debtor on the 2012 CSM judgment; and/or (2) the August 2015 judgment, to the extent Chu "requests that this court confirm that the trial court changed its 2013 order's ruling by affirming the trial court's final [August 2015] judgment after trial." But even if we were to permit Chu to "correct" his deficient notice of appeal through his briefing, that briefing likewise fails to identify an appealable order. As discussed above, the March 27, 2013 order is not a final, appealable order. Nor can the March 2013 order have "substantially affect[ed] the rights of a party" or "necessarily affect[ed] the [August 2015] judgment . . . appealed from," given that the court's final judgment effectively reversed the order. (§ 906 [interim order appealable on that basis].)

Nor can Chu properly seek review of the August 2015 judgment, as such review could not lead to a more favorable outcome for him; the judgment already dismisses all claims against Chu and awards him costs. Finally, Chu contends that "[he] filed this cross-appeal to avoid any further confusion regarding the issue

of the \$1.5 [m]illion judgment that Shankar asked the trial court to sign.” This argument reflects a fundamental misunderstanding of our role as a reviewing court. Moreover, such a request for clarification is moot in light of our decision on Shankar’s appeal above, in which we conclude that the trial court chose not to incorporate the substance of its March 2013 order into any final judgment, and instead reached the result reflected in the August 2015 judgment. (See *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 566 [“ ‘An appellate court will not review questions which are moot and which are only of academic importance.’ ”].)⁷

⁷ Shankar has also moved this court to strike Chu’s January 30, 2018 combined brief, comprised of Chu’s respondent’s brief regarding Shankar’s appeal and Chu’s opening brief in Chu’s cross-appeal. Shankar argues that the combined brief contains statements that are unsupported by record citation, demonstrably false, irrelevant, and/or reflect personal attacks on Shankar and his counsel. We deny Shankar’s motion. To the extent the briefing contains factual representations unsupported by the record, we have disregarded them in reaching our conclusions above. (See Cal. Rules of Court, rule 8.204(e)(2)(C); see, e.g., *Golden Hill Neighborhood Assn., Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416, 426, fn. 6 [disregarding references in appellate brief to irrelevant documents not contained in the superior court file].)

DISPOSITION

The trial court's August 2015 judgment is reversed to the extent it purports to adjudicate claims against or award costs to CSM. In all other respects, the judgment is affirmed. On remand the trial court shall amend the judgment accordingly.

Chu's cross-appeal is dismissed for failure to identify an appealable order or judgment.

Each party to bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.